



## Symposium for HR Professionals on Employment Liability and Legal Issues in the Public Sector

### Religious Discrimination and Accommodations

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- I was told that you want to hear about religious discrimination and accommodations. I assume you are experiencing what the rest of the country is experiencing, there are more complaints of religious discrimination than there ever have been.
- Religious discrimination cases filed with the EEOC have increased by 27 percent since 2000. In contrast sexual discrimination cases have decreased. [Sex-24,826 in 2007] Race discrimination cases had been trending downward but jumped in 2007. [30,510]

FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
1,939	2,127	2,572	2,532	2,466	2,340	2,541	2,880

- Let's take a little test to see if you are practicing religious discrimination:
  - How many of you when you hire someone have a blank on the application asking what religion the applicant is?
  - How many of you ask in interviews, what does your bishop think about this job change?
  - How many of you ask for a reference from an applicant's rabbi?
- So, if you aren't overtly discriminating, are we done? Unfortunately, for you and me the issue isn't that easy. The real question is not should I discriminate based on religion, the question is what rights do employees have to practice or observe their religion in the workplace and how far does the employer have to go in accommodating religious beliefs.
  - And you occasionally have these questions asked in the context of an employee who seems to be hiding bad performance behind religious beliefs
  - or wants to use religion in what seems an illegitimate way, maybe to get a better schedule
  - or is pushing the envelope in some other way.



- To answer the hard questions, you need to know the law, the interpretations of the law by those who enforce it, and the interpretations of the law by the courts. You can't learn all of this in 45 minutes but hopefully I can help you with the basics and give you some resources you can turn to to answer specific questions.
- Let's start with the law. In 1964 Congress passed Title VII of the Civil Rights Act. It really was enforcing the Declaration of Independence which proclaimed "All men are created equal."
  - An Act to enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.
  - Congress then passed some more specific sections to implement Title VII.
  - 42 U.S.C. § 2000e-2 states: (a) It shall be an unlawful employment practice for an employer
    - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
    - (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
  - Congress also defined religion for us in 42 U.S.C. § 2000e(j): The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.
- Now we know what the law is, are we done? No because this does not really give us much to go on. The law itself pretty much says,



discrimination = bad; judging employees on their merits = good. That is not a lot of practical guidance, we need a little more. Where do we turn to for that? The EEOC publishes a lot of materials that supplement the law. So we will start there. The handouts I have given you show you what is available on the EEOC website. Normally, I think the EEOC leans a little too much towards the employee but I think their materials on religious discrimination are actually pretty balanced and a very good resource. They aren't perfect though so we will also discuss some court rulings that further interpret the law, sometimes even overruling the EEOC.

- What does the EEOC have to say? It starts very basically. From the EEOC website:
  - Under Title VII: Employers may not treat employees or applicants more or less favorably because of their religious beliefs or practices - *except to the extent a religious accommodation is warranted*. For example, an employer may not refuse to hire individuals of a certain religion, may not impose stricter promotion requirements for persons of a certain religion, and may not impose more or different work requirements on an employee because of that employee's religious beliefs or practices.
  - Employees cannot be forced to participate -- or not participate -- in a religious activity as a condition of employment.
  - Employers must reasonably accommodate employees' sincerely held religious practices unless doing so would impose an undue hardship on the employer.
  - Employers must permit employees to engage in religious expression, [click] unless the religious expression would impose an undue hardship on the employer. [click] Generally, an employer may not place more restrictions on religious expression than on other forms of expression that have a comparable effect on workplace efficiency.
  - Employers must take steps to prevent religious harassment of their employees.
    - An employer can reduce the chance that employees will engage in unlawful religious harassment by implementing an anti-harassment policy and having an effective procedure for reporting, investigating and correcting harassing conduct.



- Okay, now we are getting somewhere, we have some more specific guidance for you. So let's turn from the general to some specific and difficult issues that you are probably facing in your workplaces and apply this guidance.
- The first topic which is becoming more common is Religious accommodation.
  - That goes back to the definition of religion in 42 U.S.C. § 2000e(j): The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.
  - The EEOC says about that: Employers must reasonably accommodate employees' sincerely held religious practices unless doing so would impose an undue hardship on the employer.
  - So our threshold test is a sincerely held religious belief. What is that.
  - EEOC provides us with a manual titled Questions and Answers: Religious Discrimination in the Workplace.  
[http://www.eeoc.gov/policy/docs/qanda\\_religion.html](http://www.eeoc.gov/policy/docs/qanda_religion.html)
  - For purposes of Title VII, religion includes not only traditional, organized religions such as Christianity, Judaism, Islam, Hinduism, and Buddhism, but also religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unreasonable to others. An employee's belief or practice can be "religious" under Title VII even if ... few—or no—other people adhere to it. Title VII's protections also extend to those who are discriminated against or need accommodation because they profess no religious beliefs.
  - Religious beliefs include theistic beliefs (i.e. those that include a belief in God) as well as non-theistic "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."
  - Although courts generally resolve doubts about particular beliefs in favor of finding that they are religious, beliefs are not protected



merely because they are strongly held. Rather, religion typically concerns “ultimate ideas” about “life, purpose, and death.” Social, political, or economic philosophies, as well as mere personal preferences, are not “religious” beliefs protected by Title VII.

- Whether a practice is religious depends on the employee’s motivation. The same practice might be engaged in by one person for religious reasons and by another person for purely secular reasons (e.g., dietary restrictions, tattoos, etc.).
  - Vegetarians? No if it is a lifestyle choice, maybe yes if it is a religious belief that all animals have souls.
    - A Seventh-day Adventist employee follows a vegetarian diet because she believes it is religiously prescribed by the scriptural passage “[b]ut flesh with the life thereof, which is the blood thereof, shall ye not eat,” (Genesis 9:4). Her vegetarianism is a religious practice, even though not all Seventh-day Adventists share this belief or follow this practice, and even though many individuals adhere to a vegetarian diet for purely secular reasons.
- Religious observances or practices you may have to accommodate include, for example,
  - attending worship services
  - praying
  - wearing religious garb or symbols
  - displaying religious objects
  - adhering to certain dietary rules
  - proselytizing or other forms of religious expression
  - or refraining from certain activities.
- Similarly, requests for accommodation of a “religious” belief or practice could include, for example:
  - a Catholic employee requesting a schedule change so that he can attend church on Good Friday
  - a Muslim employee requesting an exception to the company’s dress and grooming code allowing her to wear her headscarf
  - or a Hindu employee requesting an exception to wear her bindi (religious forehead marking)
  - an atheist asking to be excused from the religious



- invocation offered at the beginning of staff meetings
  - an adherent to Native American spiritual beliefs seeking unpaid leave to attend a ritual ceremony
  - or an employee who identifies as Christian but is not affiliated with a particular sect or denomination requests accommodation of his religious belief that working on his Sabbath is prohibited.
- So everybody is okay with the obvious things—head scarves, beards, ashes on a forehead on Ash Wednesday. What about facial tattoos as a religious belief? What about “No Work Wednesday”? What about the “Church of Marijuana”? The EEOC gives us further guidance:
  - Although there is usually no reason to question whether the practice at issue is religious or sincerely held, if the employer has a bona fide doubt about the basis for the accommodation request, it is entitled to make a limited inquiry into the facts and circumstances of the employee’s claim that the belief or practice at issue is religious and sincerely held, and gives rise to the need for the accommodation.
  - Factors that—either alone or in combination—might undermine an employee’s assertion that he sincerely holds the religious belief at issue include: whether the employee has behaved in a manner markedly inconsistent with the professed belief; whether the accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons; whether the timing of the request renders it suspect (e.g., it follows an earlier request by the employee for the same benefit for secular reasons); and whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons.
  - However, none of these factors is dispositive. For example, although prior inconsistent conduct is relevant to the question of sincerity, an individual’s beliefs – or degree of adherence – may change over time, and therefore an employee’s newly adopted or inconsistently observed religious practice may nevertheless be sincerely held. An employer also should not assume that an employee is insincere simply because some of his or her practices deviate from the commonly followed tenets of his or her



religion.

- Although the EEOC gives you some leeway, the courts are pretty liberal on this point:
  - “The inquiry into the sincerity of a free-exercise plaintiff’s religious beliefs is almost exclusively a credibility assessment, ... and therefore the issue of sincerity can rarely be determined on summary judgment,” let alone a motion to dismiss. *Snyder*, 124 F.3d at 1352-53 (internal quotation omitted). We have said that summary dismissal on the sincerity prong is appropriate only in the “very rare case[ ]” in which the plaintiff’s beliefs are “so bizarre, so clearly nonreligious in motivation that they are not entitled to First Amendment protection.” *Id.* at 1353 (internal quotation omitted). *Kay v. Bemis* 500 F.3d 1214, 1219 -1220 (10<sup>th</sup> Cir. 2007).
- What is the outside limit: the Church of Marijuana that requires smoking marijuana is not a religious belief. How did the courts get there?
  - In *United States v. Meyers*, the Tenth Circuit set forth the following five factors a district court should consider in determining whether a belief is “religious” for purposes of RFRA: (1) ultimate ideas, (2) metaphysical beliefs, (3) moral or ethical system, (4) comprehensiveness of beliefs, and (5) accouterments of religion. In *United States v. Meyers*, the United States charged the defendant with two offenses stemming from marijuana possession and trafficking. Meyers asserted that the United States could not prosecute him for these crimes because, as a “Reverend” of the “Church of Marijuana,” his possession and distribution of marijuana was legally protected religious conduct. The question before the Meyers court was whether the “Church of Marijuana” was a bona fide religion that triggered the protections of RFRA. The district court concluded that Meyers’s beliefs were secular and not religious and the Tenth Circuit affirmed. In so holding, the Tenth Circuit explained that Meyers’s beliefs “more accurately espouse a philosophy and/or way of life rather than a ‘religion.’ ” 95 F.3d at 1484.
- Religious beliefs often are ‘metaphysical,’ that is, they





address a reality which transcends the physical and immediately apparent world. Adherents to many religions believe that there is another dimension, place, mode, or temporality, and they often believe that these places are inhabited by spirits, souls, forces, deities, and other sorts of inchoate or intangible entities.”

- There is nothing metaphysical about Meyers' beliefs. Indeed, everything about his beliefs is physical. He smokes the dried leaves of a plant, and the resulting psycho-pharmacological effects leave him in a state of “peaceful awareness.” Though the Court does not doubt that certain physical states of being can engender or induce different mental states of being, this does not mean that deliberately altered physical states of being are themselves “religious.” The Court also recognizes that certain religions use mind-altering substances, or engage in mind-altering physical activities (such as fasting or sitting in sweat lodges), as a means to a spiritual end. The end usually is movement toward, or the perception of, a different reality or dimension. Here, there is no such end.
- Meyers did not say that smoking 10 to 12 joints a day propelled him into a perpetual state of religious awareness, or that smoking 10 to 12 joints a day was a means to a religious end. For Meyers, the end appears to be smoking marijuana. Meyers never equated marijuana smoking with a spiritual dimension, mystical plane, or transcendent reality. Although Meyers thinks that smoking marijuana has great therapeutic value, he did not assert that smoking marijuana lofts him into the realm of the religious. Thus, there does not appear to be anything metaphysical about Meyers' beliefs.
- But if you think no drugs are religious you would be wrong. It is accepted that the use of peyote in the Native American Church is religious.
- One more example. In another 10<sup>th</sup> Circuit case, here is a “prayer” that Mr. Snyder wanted to give at a Murray City Council meeting.
- OUR MOTHER, who art in heaven (if, indeed there is a heaven and if there is a god that takes a woman's form)





hallowed be thy name, we ask for thy blessing for and guidance of those that will participate in this meeting and for those mortals that govern the state of Utah. We fervently ask that you guide the leaders of this city, Salt Lake County and the state of Utah so that they may see the wisdom of separating church and state and so that they will never again perform demeaning religious ceremonies as part of official government functions. We pray that you prevent self-righteous politicians from mis-using the name of God in conducting government meetings; and, that you lead them away from the hypocritical and blasphemous deception of the public, attempting to make the people believe that bureaucrats' decisions and actions have thy stamp of approval if prayers are offered at the beginning of government meetings. ... We ask that the people of the state of Utah will some day learn the wisdom of the separation of church and state; we ask that you will teach the people of Utah that government should not participate in religion; we pray that you smite those government officials that would attempt to censor or control prayers made by anyone to you or to any other of our gods. ... Amen.

- Was this a sincere religious prayer. The Tenth Circuit Court of Appeals said give him the benefit of the doubt: “Snyder's supplications draw on religious tenets held by many. See Matthew 6:5; Book of Mormon, 3 Nephi 13:6. Although there is admittedly some contradictory evidence in the record, Snyder has presented sufficient evidence to create a genuine dispute of fact as to the sincerity of his religious belief that prayer should be a private matter and should not be used to self-aggrandize the prayer-giver.” Snyder v. Murray City Corp. 159 F.3d 1227, 1229 n.4 (10<sup>th</sup> Cir. 1998).
- [Matthew 6:5 "And when you pray, do not be like the hypocrites, for they love to pray standing in the synagogues and on the street corners to be seen by men. I tell you the truth, they have received their reward in full"]
- [3 Nephi 13:6 “But thou, when thou prayest, enter into thy closet, and when thou hast shut thy door, pray to thy Father who is in secret; and thy Father, who seeth in secret, shall reward thee openly”]



- Bottom line: unless it is outrageous give them the benefit of the doubt that it is a sincerely held religious belief and move on to the next step.
- Second requirement is that you have to be on notice that a religious accommodation is needed.
- Usually obvious but there are no magic words—don't have to say the word accommodation.
- What is a reasonable accommodation: A reasonable religious accommodation is any adjustment to the work environment that will allow the employee to practice his religion.
  - An employer might accommodate an employee's religious beliefs or practices by allowing:
    - flexible scheduling—arrive early, leave late, rearrange breaks, trade holidays for another day.
    - voluntary substitutions or swaps—you don't have to make employees swap days off but you should allow them to.
    - job reassignments and lateral transfers
    - modification of grooming requirements
    - and [modification of] other workplace practices, policies and/or procedures.
  - Let's run through some examples:
    - Employee doesn't want to work on his Sabbath—Friday night, Saturday, Sunday. Can accommodate how?
      - Give them Sunday-Monday off.
      - Let them trade with another employee.
      - Lateral transfer to another agency; e.g. from the Prison and 24/7 schedule to DHS M-H schedule.
    - Employee wants to wear a turban.
      - Allow an exception to your dress code.
    - Employee wants long hair or a beard.
      - Modify your grooming code.
    - Employee wants to pray 5 times a day.
      - Set aside a room they can use.
      - Allow lunch hour and breaks to be taken in five



shorter periods.

- But an employer is not required to accommodate an employee's religious beliefs and practices if doing so would impose an undue hardship on the employers' legitimate business interests.
- Very important point. EEOC Questions and Answers states: “Note that this is a lower standard for an employer to meet than undue hardship under the Americans with Disabilities Act (ADA) which is defined in that statute as ‘significant difficulty or expense.’ ”
- This term was defined by the US Supreme Court in the case of *TWA v. Hardison*, 432 U.S. 63 (1977).
  - Hardison could not work on Saturdays. Unfortunately, he had low seniority and could not bid for a shift that did not work Saturdays. The court of appeals said that TWA could reasonably accommodate him without undue hardship by: (1) letting him work a four-day week, utilizing a supervisor or another worker on duty elsewhere, even though this would have caused other shop functions to suffer; (2) TWA could have filled respondent's Saturday shift from other available personnel, even though this would have involved premium overtime pay; or (3) TWA could have arranged a "swap" between respondent and another employee either for another shift or for the Sabbath days, even though this would have involved a breach of the seniority system.
- The United States Supreme Court reversed. They said each of these alternatives was an “undue hardship.”
  - An agreed-upon seniority system is not required to give way to accommodate religious observances, and it would be anomalous to conclude that by "reasonable accommodations" Congress meant that an employer must deny the shift and job preferences of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others. Title VII does not require an employer to go that far.
  - The court noted on this point that it would be okay



for Hardison to get someone to switch shifts with him. You would have to allow that. But the employer did not have to force a switch, that was an undue hardship.

- On having other employees work Saturday at extra cost or less efficiency, the court said that anything that imposed more than a de minimis cost in order to give Hardison Saturdays off would be an undue hardship.
- So what does the EEOC make of these rulings? An employer can show undue hardship if accommodating an employee's religious practices
  - requires more than ordinary administrative costs
  - diminishes efficiency in other jobs
  - infringes on other employees' job rights or benefits
  - impairs workplace safety
  - causes co-workers to carry the accommodated employee's share of potentially hazardous or burdensome work
  - or if the proposed accommodation conflicts with another law or regulation.
- Let's go back to the examples I posed earlier. Employee doesn't want to work on his Sabbath—Friday night, Saturday, Sunday. What don't you have to do?
  - Give them that day off if they are not senior enough to bid on that day.
  - Force them to trade with another employee.
- Employee wants to wear a turban.
  - An office worker should be allowed to wear a turban. A prison guard can be denied that if a head covering poses a security risk such as a determination by the prison that head coverings may be used to conceal drugs, weapons, or other contraband, or may spark internal violence among prisoners.
- Employee wants long hair or a beard.
  - If they have to wear breathing equipment you don't have to allow that.
- Employee wants to pray 5 times a day.



- You don't have to build a room.
- You don't have to dedicate a room solely to prayer.
- You don't have to require other employees to pick up the workload during those times.
- What are not undue hardships?
  - Co-workers complaints about an employee being granted an accommodation. Although religious accommodations that infringe on co-workers' ability to perform their duties or subject co-workers to a hostile work environment will generally constitute undue hardship, general disgruntlement, resentment, or jealousy of co-workers will not. Undue hardship requires more than proof that some co-workers complained; a showing of undue hardship based on co-worker interests generally requires evidence that the accommodation would actually infringe on the rights of co-workers or cause disruption of work.
  - Fear that others will want the accommodation—if I let you take off a religious holiday everyone will want that day off whatever religion they are.
  - Speculation about costs.
- What else do you need to do on religious accommodation?  
Suggest an alternate accommodation.
  - You don't need to just say yes or no. An employer is also not obliged to provide the accommodation preferred by the employee. What you do need to do is work with the employee to find a mutually satisfactory solution. Employee says they can't work on Saturday. Arrange for a swap of shifts with an employee who can't work Sundays.
  - EEOC says: Employer-employee cooperation and flexibility are key to the search for a reasonable accommodation. If the accommodation solution is not immediately apparent, the employer should discuss the request with the employee to determine what accommodations might be effective. If the employer requests additional information reasonably needed to evaluate the request, the employee should provide it.



- For example, if an employee has requested a schedule change to accommodate daily prayers, the employer may need to ask for information about the religious observance, such as time and duration of the daily prayers, in order to determine whether accommodation can be granted without posing an undue hardship on the operation of the employer's business. Moreover, even if the employer does not grant the employee's preferred accommodation, but instead provides an alternative accommodation, the employee must cooperate by attempting to meet his religious needs through the employer's proposed accommodation if possible.
- Example: EXAMPLE 31 Clarifying a Request  
Diane requests that her employer schedule her for "fewer hours" so that she can "attend church more frequently." The employer denies the request because it is not clear what schedule Diane is requesting or whether the change is sought due to a religious belief or practice. While Diane's request lacked sufficient detail for the employer to make a final decision, it was sufficient to constitute a religious accommodation request. Rather than denying the request outright, the employer should have obtained the information from Diane that it needed to make a decision. The employer could have inquired of Diane precisely what schedule change was sought and for what purpose, and how her current schedule conflicted with her religious practices or beliefs. Diane would then have had an obligation to provide sufficient information to permit her employer to make a reasonable assessment of whether her request was based on a sincerely held religious belief, the precise conflict that existed between her work schedule and church schedule, and whether granting the accommodation would pose more than a de minimis burden on the employer's business.
- A closely related topic: Employers must permit employees to engage in religious expression, unless the religious expression would impose an undue hardship on the employer.
  - Harassment is an undue hardship.
  - But when does one employee's expression become harassment to



another employee?

- Here is another document you might find useful to turn to for day-to-day answers. The EEOC Compliance Manual, Section 12 Religious Discrimination  
[http://www.eeoc.gov/policy/docs/religion.html#\\_ftn208](http://www.eeoc.gov/policy/docs/religion.html#_ftn208)  
The first page is in your handouts.
- Here are some common situations. Do you have to accommodate these? When is there undue hardship? More specifically, when is there undue hardship because of religious harassment of other employees?
  - Cross in the office.
    - Allow, not an undue hardship.
  - Jesus Saves poster in the office.
    - Allow, not an undue hardship.
  - Jesus Saves poster in the lobby above the security desk.
    - Not allow. Might be perceived to constitute government endorsement of a particular religion and pose an Establishment Clause violation. See *Berry v. Dep't of Social Servs.*, 447 F.3d 642 (9th Cir. 2006) (accommodating social worker's request to display religious items in his cubicle and to discuss religion with clients would have posed an undue hardship under Title VII on county social services department since the accommodations sought would create a danger of the employer violating the Establishment Clause);
    - *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517 (9th Cir. 1994) (school district's restriction on teacher's First Amendment right of free speech in prohibiting teacher from talking with students about religion during school day was justified by school district's interest in avoiding Establishment Clause violation)
    - *Draper v. Logan County Pub. Library*, 403 F. Supp. 2d 608 (W.D. Ky. 2005) (public library's decision to bar employee from wearing necklace with cross was not justified by library's purported interest in avoiding Establishment Clause violation; "[a] different conclusion might be justified, if for





example, the library allowed employees to actively proselytize or if it permitted religious banners or slogans to be hung from the rafters”).

- How about a Swastika because the religion is white supremacy?
  - Historical symbol of hate and genocide so don't have to allow.
- Have a blessed day:
  - U.S.F. Logistics, 274 F.3d at 476 (employer reasonably accommodated plaintiff's religious practice of sporadically using the phrase "Have a Blessed Day" when it permitted her to use the phrase with co-workers and supervisors who did not object, but prohibited her from using the phrase with customers where at least one regular client objected; allowing her to use the phrase with customers who objected would have posed an undue hardship)
- God bless you or praise the lord:
  - Banks v. Serv. Am. Corp., 952 F. Supp. 703 (D. Kan. 1996) (plaintiff food service employees at company cafeteria, who were terminated when they refused to stop greeting customers with phrases such as "God Bless You" and "Praise the Lord," presented a triable issue of fact regarding whether they could have been accommodated without undue hardship; in the absence of employer proof that permitting the statements was disruptive or that it had any legitimate reason to fear losing business, a reasonable jury could conclude that no undue hardship was posed; the employer received only 20 to 25 complaints while serving approximately 130,000 to 195,000 customers, which is a complaint rate of between .01025 and .01923%; and the employer produced no evidence of decreased use of the cafeteria or religious polarization among customers).
  - Different result if the expression can be perceived as representing the official view of the employer. No complaints are necessary in that situation.



- In the name of Jesus Christ of Nazareth:
  - Johnson v. Halls Merch., 1989 WL 23201 (W.D. Mo. Jan. 17, 1989) (court found it would have posed undue hardship on employer to permit retail employee's regular statement to customers "in the name of Jesus Christ of Nazareth," because it offended the beliefs of some customers and therefore cost the company business).
- How about this one. Your IT person carries a USB drive in the form of a cross and tries to convert coworkers or customers every time he fixes a computer:
  - Knight, 275 F.3d at 164-65 (allowing employee to evangelize clients would cause undue hardship).
  - EEOC Compliance Manual EXAMPLE 50 Undue Hardship to Allow Employee to Discuss Religion with Clients. Helen, an employee in a mental health facility that served a religiously and ethnically diverse clientele, frequently spoke with clients about religious issues and shared religious tracts with them as a way to help solve their problems, despite being instructed not to do so. After clients complained, Helen's employer issued her a letter of reprimand stating that she should not promote her religious beliefs to clients and that she would be terminated if she persisted. Helen's belief in the need to evangelize to clients cannot be accommodated without undue hardship. The employer has the right to control speech that threatens to impede provision of effective and efficient services. Clients, especially in a mental health setting, may not understand that the religious message represents Helen's views rather than the clinic's view of the most beneficial treatment for the patient.
  - EXAMPLE 27 Harassment by Co-Workers. John, who is a Christian Scientist, shares an office with Rick, a Mormon. Rick repeatedly tells John that he is practicing a false religion, and that he should study Mormon literature. Despite John's protestations that he is very happy with his religion and has no desire to convert, Rick regularly leaves religious pamphlets on John's desk and tries to talk to him about religion. After vainly asking Rick to stop the behavior, John complains to their immediate supervisor,



who dismisses John's complaint on the ground that Rick is a nice person who believes that he is just being helpful.

- Should Rick be told to stop this?
  - What if Rick responds that he can't because "Every member a missionary" is the direction of his prophet.
  - This crosses the line to harassment and need not be accommodated. If John's complaints are ignored it likely rises to the level of actionable harassment and the employer is liable because it knew, through the supervisor, about Rick's harassing conduct but failed to take immediate and appropriate corrective action.
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- Finally, here is an interesting example of everyone winning. A Roman Catholic woman filed a claim of discrimination when her employer forbid her from wearing an anti-abortion pin (which contained a picture of a fetus) that she claimed she had made a religious vow to wear at all times. Her co-workers complained that they found it offensive and threatened to walk off the job. The employer offered the woman two alternatives: either wearing the pin under her clothes or wearing a different pin without a fetus. She rejected the proposed accommodation and sued. In *Wilson v. U.S. West Communications*, 58 F.3d 1337 (8th Cir. 1995), the court found for the employer, holding that it had offered a reasonable accommodation.
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- Let's shift gears a little bit, get seasonal. **EXAMPLE 52 Employer Holiday Decorations.** Each December, the president of XYZ State Agency directs that several wreaths be placed around the office building and a tree be displayed in the lobby. Several employees complain that to accommodate their non-Christian religious beliefs, the employer should take down the wreaths and tree, or alternatively should add holiday decorations associated with other religions.
  - Title VII does not require that XYZ corporation remove the wreaths and tree or add holiday decorations associated with other religions.
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- Final topic. The legitimate, non-discriminatory reason is your friend.
  - We have talked about obvious discriminatory actions, the job



application or the interview question. Those do not come up much. What is more common is a job action is misconstrued as being based on religious discrimination. How do you avoid that? By being able to articulate a legitimate, non-discriminatory reason for the job action.

- 42 U.S.C. § 2000e-5(g)(2)(A) provides a safe harbor: No order of the court shall require the ... hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused ... employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin ....
- We did this because \_\_\_\_\_.
- *Frick v. Wells Fargo & Co.* 68 Fed.Appx. 173, 175, 2003 WL 21437205, 3 (C.A.10 (Colo. (C.A.10 (Colo.),2003): Title VII of the Civil Rights Act of 1964 makes it an “unlawful employment practice for an employer ... to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... religion.” 42 U.S.C. § 2000e-2(a)(1). In order to prevail on a Title VII religious-discrimination claim, the plaintiff must show that the defendant intentionally discriminated against him by offering proof “ ‘either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.’ ” \*176 *EEOC v. Wiltel, Inc.*, 81 F.3d 1508, 1513 (10th Cir.1996) (quoting *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)). A plaintiff may also prove religious discrimination by demonstrating that her employer failed to reasonably accommodate her religious practices or beliefs or that her employer subjected her to disparate treatment because of her religious beliefs. *Shapolia v. Los Alamos National Laboratory*, 992 F.2d 1033, 1037 (10th Cir.1993).

Mr. Frick's claim fails under any of these theories of religious discrimination. After reviewing the record, we find no evidence that Mr. Frick's termination was the result of his religious beliefs. Conversely, there is ample evidence in the record that Mr. Frick was terminated for legitimate, nondiscriminatory reasons.



Specifically, Mr. Frick was advised that company policy prohibited the distribution of pamphlets in the workplace, yet he continued to distribute them. Other company employees complained about Mr. Frick's conduct, reporting that he interacted with them in an offensive and unprofessional manner. Wells Fargo counseled Mr. Frick about this behavior, but he continued to lose his temper and refer to coworkers in a derogatory manner.